

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT COURT OF WEST VIRGINIA

AT CHARLESTON

DONALD ELKINS, Administrator
of the Estate of Kathy Hensley,
and SHEILA ELKINS,

Plaintiffs,

v.

Civil Action No.: 08-CV-1403
Judge Goodwin

MONUMENTAL LIFE INSURANCE
COMPANY,

Defendants.

**PLAINTIFFS' RESPONSE TO DEFENDANT'S
MOTION IN LIMINE TO EXCLUDE EVIDENCE OF
OTHER LAWSUITS AND COMPLAINTS**

NOW, comes the plaintiffs, Donald Elkins, as Administrator of the Estate of Kathy Hensley, and Sheila Elkins, plaintiffs, by and through their counsel, Christopher J. Heavens and Greg Smith and respond to the defendant's motion in limine to exclude evidence of other lawsuits and complaints.

Factual Summary

Monumental has asserted that there are several other companies calling themselves "Monumental Life Insurance Company" and that the all of the plaintiffs' general business practice evidence involves other companies using the same name. There is no objective evidence to support Monumental's assertion on this point. Moreover, there has been no plausible explanation as to why there are several companies using the same name. The unusual nature of Monumental's assertion, along with Monumental's initial failure to disclose claim information about these so-called "other companies," requires Monumental to provide certainty to the Court on this issue before excluding evidence that on its face is relevant and admissible.

Monumental asserts in its brief that complaints against other companies that utilize the "MLIC name" relative to their products may "have been improperly coded against MLIC." However, Monumental offers the Court no evidence that it complained about and/or corrected the alleged improper coding of complaints. If this was indeed a problem, those responsible for improper coding would have been notified and the problem corrected.

Legal Analysis

West Virginia Code § 33-11-4 permits the introduction of general business practice evidence. Monumental's attempt to exclude such evidence on grounds that it is being misapplied to a company bearing the same name is not credible. Furthermore, since such evidence is statutorily permissible, it should not be excluded as hearsay and cannot be called irrelevant or unfairly prejudicial. SEE: Jenkins v. J.C. Penney Cas. Ins. Co., 280 S.E.2d 252 (W.Va. 1980).

Contrary to Monumental's assertion, the plaintiffs have identified witnesses that can specifically testify that the Monumental agent in question, J.B. Hall, has engaged in a general business practice of failing to record relevant information on insurance applications despite being provided with such information by applicants. David White and his mother, Dorothy Waugh, have been identified by plaintiffs as witnesses who have evidence of J.B. Hall engaging in virtually identical misconduct on Mr. White's Monumental application.

Finally, even if the Court later determines that there is some validity to Monumental's assertion that other companies use its name and are the focus of all complaints referenced by the plaintiffs in this instance, the Court should permit the plaintiff to introduce general business practice evidence to the extent that such companies utilize the same underwriting and claim personnel.

WHEREFORE, the plaintiffs move this Honorable Court to deny the defendant's motion in limine to exclude evidence of general business practices of the company known as Monumental Life Insurance Company, and to grant such other relief as may be deemed appropriate.

s/Christopher J. Heavens

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CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2009, I electronically filed the original **PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF OTHER LAWSUITS AND COMPLAINTS** with the Clerk of the Court using CM/ECF system, which will send notification of such filing to the following CM/ECF participants. A full copy of said pleading is being provided to counsel for the defendant this said day via U.S. Mail.

s/Christopher J. Heavens
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